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CURRENT DEVELOPMENTS

The identification of individuals

Some thoughts on the ECHR judgment in the case N.D. and N.T.

DANA SCHMALZ — 16 October, 2017

The European Court of Human Rights (ECtHR) in its judgment in the case and N.T. v. Spain found that push-backs to Morocco in the border zone of the Spanish enclave Melilla violated the prohibition of collective expulsion. The decision is important as it concerns the delimitation between legitimate border protection and practices that violate the European Convention of Human Rights (ECHR) – and thereby the key question in all regulation of migration: how to fairly balance interests of state sovereignty and the rights of migrants as protected in human rights treaties. The interpretation of respective human rights norms and of the conditions under which they bind a particular state participates beyond the concrete case in a debate across courts and across jurisdictions about just criteria for balancing both sides.

Nothing in the argumentation of the court comes as a complete surprise: the court affirms its understanding of the extra-territorial applicability of the ECHR, and consolidates in a convincing way its jurisprudence on the prohibition of collective expulsion under Article 4 of the 4th Additional Protocol (AP). What is remarkable is what the court does not elaborate on: Spain's contention that an official border post was available for filing asylum claims and that this should be taken into account when assessing the expulsions. Noteworthy are moreover the conditions for such scenario to even get before the court: the commitment of non-governmental organizations and the conditions of strategic litigation. These aspects are vaguely visible in the judgment through the question of victim status.

Overall, the judgment has the potential of becoming an important reference point in the European and the international legal debate about migration control. First we will have to wait whether Spain requests a referral to the Grand Chamber, which would certainly have high chances of being accepted.

The facts of the case

The border zone between Morocco and the Spanish Melilla comprises three fences, two with a height of six meters and one of three meters. In addition to barbed wire, the fences have specific devices to hinder jumping down; moreover, infrared cameras and motion detectors are installed to hinder unnoticed crossings. At this border the events of

the case took place. On 13 August 2014, the later applicants, N.D. and N.T., tried crossing into Melilla. N.D. is a Malian national, N.T. is a national of Côte d'Ivoire. The attempt of scaling the barriers they undertook together with a group of more than 70 other migrants; all of them were arrested by the Spanish *Guardia Civil* and returned to Morocco immediately, without any procedure of identification. In Morocco, the migrants were denied medical treatment, transported 300 kilometers into the country to Fez, and left without any further assistance. That the case actually came before the ECtHR is due to the fact that non-governmental organizations and journalists were present at the scene, and videos were recorded on which N.D. and N.T. could be identified.

Applicability of the Convention and victim status

In a first step, the court had to determine whether the ECHR was applicable, thus whether the events fell under Spanish jurisdiction in sense of Article 1 ECHR. Two of the three fences separating Morocco and Melilla are placed on Moroccan territory, one on Spanish territory. N.D. had climbed the third fence before being returned, N.T. was seized between the second and the third. But all this had no relevance, the court held, since Spain in interdicting and returning the persons was exercising control, establishing jurisdiction (para. 53, 54).

The court equally rejected Spain's contention that the applicants lack the victim status necessary for an application under Article 34. The Spanish government had argued that the video recordings did not allow to unequivocally identify the two applicants, and even if N.D. and N.T. had been among the persons returned that day, their later successful attempt to enter Spain ended their victim status. The second point the court rejects in one sentence: entering Spain at a later point does not affect the question whether rights under the Convention were violated in that instance. Moreover, the court considered credible that N.D. and N.T. were among the filmed persons on the recordings. That no clearer documentation exists who was rejected that day is attributable to Spain (para. 60).

Violation of the prohibition of collective expulsion

The central question was whether Spain in its treatment of N.D. and N.T. violated the prohibition of collective expulsion under Article 4 of Additional Protocol 4 to the ECHR. As the court stresses, the objective of that rule is to prohibit states from expelling a whole group of persons without taking note of individual circumstances and thereby allowing each person to be heard with her arguments (para. 99). In the present case, an expulsion clearly took place (para. 105); whether N.D. and N.T. were already on Spanish territory is irrelevant for that matter since the prohibition of collective expulsions also applies at the border, and to the denial to enter the territory (para. 104). This expulsion was collective in nature since no identification of the individuals took place, left alone a possibility to raise arguments. N.D. and N.T. were returned in a group of 75 to 80 persons, individual circumstances did not play any role (para. 107).

Two points were raised by the parties that the ECtHR does not address – in a telling silence: Spain argued that the prohibition of collective expulsion could not be violated because the applicants tried to enter Spanish territory illegally, although official border posts were available to apply for asylum (para. 74). No right exists, maintained the Spanish government, to enter a state in any chosen way (para. 79). The applicants objected that no possibility to apply for asylum existed, in particular not for persons from sub-Saharan states. At the border post of Beni-Enzar, an office for international protection was opened in the time after the events, in November 2014. As the Human Rights Commissioner of the Council of Europe and by the UN High Commissioner for Refugees,

intervening as third parties, also stressed, there was no possible way to claim asylum in August 2014, and even later almost exclusively for Syrian refugees (para. 86). To note apart from this case: such pre-classification along criteria of nationality runs counter to the assessment of each individual case as the Geneva Refugee Convention foresees it. This will remain a recurring theme in the attempts of the European Union to "classify" migrants and asylum seekers already in North-African states, and it is important to re-emphasize in that regard the principle of non-discrimination and the right to access an individual procedure independently from one's nationality.

What further underlies the contention regarding the border post is the purpose of the prohibition of collective expulsion: does it (only) secure the principle of non-refoulement by ensuring a possibility to be heard and potentially to apply for asylum, or is the purpose of Article 4 AP 4 ECHR wider, protecting migrants regardless of their potential qualification as refugees? This links to another line of argument the ECtHR does not even enter into: considerations whether the notion of aliens in the prohibition of collective expulsions can be read in an exclusionary manner. The applicants and intervening parties had emphasized (para. 82, 90) that Article 4 AP 4 ECHR protects persons regardless of their potential status as refugees. This is evident from the wording, and necessary also with regard to refugee protection, since a decision about refugee status can only be taken after the identification of individuals. In this case, the applicants were not accorded refugee status in later proceedings; that this does not play any role for the assessment of the events the court made clear by not even addressing the issue.

Beside the violation of the prohibition of collective expulsion, the court found a violation of the right to an effective remedy under Article 13 ECHR.

"New challenges"

In its considerations, the ECtHR includes the phrase of the "new challenges", which European states face in immigration control because of the "economic crisis and recent social and political changes" and their "particular impact on certain regions of Africa and the Middle East" (para. 101). This formula the court previously employed in the case Khlaifia (para. 241) and in the case Hirsi Jamaa (para. 176). Demonstrating that it is mindful of states' sovereignty concerns here serves the court as rhetorical buttress to subsequently clarify that these concerns find their limits where they lead to a violation of individual rights under the Convention. At the same time, the formula suggests the overall political situation being a factor to the balancing of the court. This is unsound insofar as the overall political situation can hardly be determined objectively but is subject to collective perceptions – and thus to varying public opinions. Yet courts generally are called to protect individual rights regardless of a changing political climate or majority opinions.

"People like us"

This case on many levels concerned the identification of individuals. The prohibition of collective expulsion is about the required identification of individual persons. But already the submission of an individual application to the court depends on the identification of individuals. I have mentioned in the beginning the crucial role non-governmental organizations and strategic litigation for such constellation to come before the ECHR and be examined. Finally, also the perception of such case in the democratic public is about the discerning of individuals among the migrants regularly described in numbers and framed as masses. The case in that sense invites readers to reflect about the situation at Europe's external borders for which ultimately not only the Spanish but also the

European citizenry bears responsibility. And it offers a possibility to reflect about these regulations in that vein through the lens of an individual case and with view to concrete persons, N.D. and N.T..

Regarding the perception of the individuals involved, Judge Dmitry Dedov's partly dissenting opinion offers a strange but insightful spin. His dissent concerns solely the compensation: 5000 Euro were accorded to each of the applicants for compensation of immaterial damage. For this estimation it obviously played a role that N.D. and N.T. successfully entered Spain in a subsequent attempt, and were expelled from there after a legal procedure. The damage accordingly referred not to a denied asylum procedure but to the denial at that time, as well as to the treatment of the applicants in violation of the Convention. Judge Dedov agrees with the majority decision in its general findings, yet suggests that the amount of 5000 Euro is too high: recognizing the violation of the convention would be sufficient to compensate for the immaterial damage, he argues. To motivate this, Dedov stresses that the applicants tried violently and illegally to cross the border. One should put oneself in the shoes of the border guards, he suggests, who are "people like us" (sic!) and deserve respect.

The relation between this assertion and the immaterial damage of the applicants I have difficulties to see. However, what this peculiar separate opinion shows are two things: Firstly, how persistent the false argument "but they were acting illegally" is – despite the principle of non-penalization in Article 31 (1) Geneva Refugee Convention, and even for a judge who a moment prior established with the majority that no legal ways existed for claiming asylum. And secondly, that it is worthwhile to remember from time to time, that also the migrants, be they entitled to protection under international law or not, are "people like us".

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